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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1571

NEW JERSEY DEPARTMENT OF INSTITUTIONS AND AGENCIES, DIVISION OF PUBLIC WELFARE, DIRECTOR OF DIVISION OF PUBLIC WELFARE,

Petitioners,

v.

JO ANN HAUSMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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RESPONSE NOT PRINTED

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No.

NEW JERSEY DEPARTMENT OF INSTITUTIONS AND AGENCIES, DIVISION OF PUBLIC WELFARE, DIRECTOR OF DIVISION OF PUBLIC WELFARE,

Petitioners,

v.

JO ANN HAUSMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

New Jersey Department of Institutions and Agencies, Division of Public Welfare, and the Director of the Division of Public Welfare petition for a writ of certiorari to review the judgment of the Supreme Court of New Jersey entered in this case on January 22, 1974.

Opinions Below

The opinion of the Supreme Court of New Jersey (Appendix A) was entered on January 22, 1974, amended February 4, 1974, and is reported at 64 N. J. 202, 314 A. 2d

362 (1974). The opinion of the Superior Court of New Jersey, Appellate Division (Appendix B) was entered on May 24, 1973 and is reported at 124 N. J. Super. 139, 305 A. 2d 85 (1973).* The determination of the Director of the New Jersey Division of Public Welfare (Appendix C), which was rendered on August 21, 1972, is unreported.

Jurisdiction

The judgment of the Supreme Court of New Jersey questions the validity of state regulations on the ground that they violate federal regulations which implement the Federal Social Security Act. Jurisdiction to review the judgment below by writ of certiorari is conferred upon this Court by 28 U.S.C. §§ 1257(3) and 2101(c).

Statutes and Regulations Involved

The pertinent provisions of the regulations of the Federal Department of Health, Education and Welfare (45 C.F.R. §§ 233.20(a)(2) and (3), 233.90(a), the Federal Social Security Act of 1935, as amended (42 U.S.C. § 602(a)(7)), and the New Jersey Financial Assistance Manual (sections 111 and 115) are set forth in Appendix D. A copy of the entire Financial Assistance Manual has been lodged with the Clerk of this Court.

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* According to New Jersey practice, the opinions of appellate courts in the State are self-executing and no separate judgment is entered after the rendering of an opinion. Accordingly, the opinions set forth in Appendices A and B are the final judgments of the courts below.

Questions Presented

1. Does either the Federal Social Security Act or the regulations of the Department of Health, Education and Welfare adopted thereunder prohibit a state from setting *per capita* standards of need for the Aid to Families With Dependent Children program which vary depending upon the size of the household in which a recipient resides, irrespective of whether all members of the household are eligible for the program?

2. Did the Supreme Court of New Jersey err in reading *Lewis* v. *Martin,* 397 U. S. 552 (1970), which upheld a Department of Health, Education and Welfare regulation providing that income of a member of the household without an obligation of support may not be presumed to be available in calculating the amount of income available to offset the standard of need of a welfare recipient, as invalidating a schedule which reduces the *per capita* standard of need as the total size of a household increases?

Statement of the Case

This case came before the Supreme Court of New Jersey upon certification to the Superior Court of New Jersey, Appellate Division, after the Appellate Division had adjudged section 115 of the New Jersey Financial Assistance Manual (hereafter Manual) to be violative of regulations of the federal Department of Health, Education and Welfare (hereafter HEW) and decisions of the Court in *King* v. *Smith,* 392 U. S. 309 (1968) and *Lewis* v. *Martin,* 397 U. S. 552 (1970). The Supreme Court of New Jersey affirmed the judgment of the Superior Court, Appellate Division. Petitioners herein are the state agen-

cies responsible for supervising the administration of the federal Aid to Families with Dependent Children program (hereafter AFDC) in New Jersey.

Section 115 of the Manual contains the schedule of amounts set by New Jersey for determining standards of need under AFDC. (Appendix D.) The schedule is set forth in tabular form according to two determinants: the number of persons who are eligible and the number of persons in the household of which the eligible persons are a part. According to the schedule, the designated monetary figure applicable to each person decreases as the total number of persons in the household increases. Since the figures set forth in section 115 of the Manual were obtained from a statewide study of the actual needs of welfare recipients in various household sizes, these figures represent the average decrease in per person living costs which occurs as greater numbers of people live together.

Respondents, Jo Ann Hausman and her minor daughter (appellants below) are AFDC recipients and meet the eligibility requirements of the AFDC program which are set forth in the Social Security Act (42 U.S.C. 601 *et seq.*) and the New Jersey statutes relating to AFDC (N.J.S.A. 44:10-1 *et seq.*). Until May 1971 respondents lived in a household by themselves. Their monthly grant was then determined to be $214, because the need standard under the Manual for 2 persons who are eligible for AFDC in a total household of 2 persons is $214. Respondents had no income or resources which could be considered pursuant to 42 U.S.C. 602(a)(7) for welfare purposes and which could be considered to offset the standard allowance; thus, their monthly grant was identical to the monthly standard allowance figure of $214.

In May 1971, Jo Ann Hausman's paramour, who does not meet the eligibility requirements for the AFDC program, moved into the household. Thereafter, respondents' monthly grant was determined by using the scheduled amount in section 115 of the Manual for 2 eligible persons (mother and daughter) in a household size of 3 persons, which is $188. per month. Respondents still had no income and the paramour was not considered to be contributing income to the recipient or her child, so there was still no income or resources which could be budgeted for welfare purposes and which would offset the standard allowance. Therefore, the monthly grant was identical to the standard allowance of $188. and respondents' grant was reduced accordingly.

Respondents appealed the reduction to the Director of the Division of Public Welfare who affirmed the use of $188. as the appropriate standard of need. (Appendix C) Thereafter, respondents appealed to the Superior Court of New Jersey, Appellate Division, asserting that the use of the $188. amount, rather than the $214. amount, violated HEW regulations and decisions of this Court which prohibit the attribution of unavailable income to AFDC recipients when computing their recognizable income. On May 24, 1973, the Appellate Division reversed the determination of the New Jersey Division of Public Welfare and invalidated section 115 of the Manual as inconsistent with HEW regulations governing the computation of an AFDC recipient's income (45 C.F.R. 233.20 (a)(3)(ii)(c)) and inconsistent with the decisions of this Court in *King* v. *Smith, supra,* and *Lewis* v. *Martin, supra.* (Appendix B)

On January 22, 1974, the Supreme Court of New Jersey affirmed the judgment entered by the Appellate Division. The Supreme Court of New Jersey held that the

State is precluded, by the decisions of this Court in *King* v. *Smith* and *Lewis* v. *Martin*, from counting the noneligible person as a member of the household when setting the standard of need for the AFDC recipients absent proof in each individual case that the noneligible person is paying his own share of the total household expenses. (Appendix A)

Reasons for Granting the Writ

A. The questions presented are substantial.

This case concerns whether New Jersey can express its standard of need in terms of average per person costs in various household sizes. The standard of need is a factor in welfare grant computations which has undergone a significant evolution since the AFDC program began in 1935. See *Rosado* v. *Wyman*, 397 U. S. 397 (1970). The evolution has been essentially from the use of a standard suited to each individual welfare recipient to the use of a standard which is expressed in terms of a single consolidated figure based upon average prices of items recognized by the State as needed items. There are basically two reasons for this: first, the AFDC program, which served three thousand persons in 1935, has grown to a major public assistance program which now serves over ten million persons, and secondly, there has been a change in philosophy from the paternalistic approach which formerly considered the AFDC program as a means of caring for recipients and managing their individual budgets, to an approach which sees the program as a means of providing recipients with a fixed sum which they can spend as they choose.

In *Rosado* v. *Wyman, supra*, this Court considered the method in which states may, consistent with the Federal

Social Security Act, arrive at a consolidated, streamlined expression of the standard of need on the basis of statistical averages. In *Jefferson* v. *Hackney*, 406 U. S. 535 (1972), this Court considered the method in which states may, consistent with the Federal Social Security Act, make ratable reductions upon the standard of need, on the basis of fixed percentages. In *Dandridge* v. *Williams*, 397 U. S. 471 (1970), this Court considered the method in which states may establish maximum payment levels which correspond with increasing family sizes so that the economies of scale which generally result in large families may be recognized in establishing such maximum payment levels. The instant case presents the Court with the opportunity to further clarify the method by which states may, consistent with the Social Security Act, express in a consolidated standard of need amount, the factor household size and the reduced per person expenses which are realized with increases in the household size. The need for this Court to address this issue has become increasingly apparent as more states arrive at a consolidated standard of need which recognizes that household size has a bearing upon individual costs and as more lower courts evidence confusion when they try to reconcile the holdings of this Court in *Rosado*, *Jefferson*, and *Dandridge* with the decisions in *King* v. *Smith* and *Lewis* v. *Martin*.*

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*At least four lower courts have evidenced misunderstanding of *King* and *Lewis* with reference to household size and standard of need. See *Mothers and Childrens Rights Organization* v. *Stanton*, Civil No. 72 F. 69 (N. D. Ind., March 1, 1973); *Owens* v. *Parham*, 350 F. Supp. 598 (N. D. Ga. 1972); *Jenkins* v. *Georges*, 312 F. Supp. 289 (W. D. Pa. 1969); *Hurley* v. *Van Lare*, 365 F. Supp. 186 (S. D. N. Y. 1973), *appeal docketed*, No. 73-2671, 2nd Cir., Oct. 25, 1973.

B. The court below misconstrued the decisions of this Court in *King* v. *Smith* and *Lewis* v. *Martin* and misapplied federal law in invalidating the uniform application of New Jersey's standard of need schedule.

This case arises in the context of the AFDC program, a cooperative federal-state welfare program established pursuant to the Social Security Act (42 U.S.C. 601 *et seq.*) and effectuated in New Jersey through the provisions of N.J.S.A. 44:10-1 *et seq.* As has been noted by the Court, there are two basic and separate factors which enter into the process of determining the amount of assistance which will be paid by the State through the AFDC program:

> "First, it is necessary to establish a 'standard of need,' a yardstick for measuring who is eligible for public assistance. Second, it must be decided how much assistance will be given, that is, what 'level of benefits' will be paid." *Rosado* v. *Wyman*, 397 U. S. at 408.

The regulations of HEW setting forth the elements which a state must include in its state plan observe a consistent distinction between (1) the "standard of need" which the state must define in its plan, and (2) the computation of "income and resources" of individual recipients. In fact, HEW has organized the regulations pertaining to each of these items into separate sections, thereby seeking to avoid an interpretation which would mix the two. (See, 45 C.F.R. 233.20(a)(2) relating to "Standards of Assistance" and 45 C.F.R. 233.20(a)(3) relating to "Income and Resources.") (Appendix D) This is appropriate because each refers to a different step in the computation of an individual's welfare grant. Thus, for each individual recipient the welfare department must

determine the individual grant by ascertaining the "standard of need" set by the state for the individual. Then, the department must compute the "earned income and resources" of the recipient (42 U.S.C. 602(a)(7)) by noting the person's gross income and applying to that amount deductions for statutorily defined income disregards (42 U.S.C. 602(a)(8)), for mandatory payroll deductions (such as withholding taxes), for costs of child care, for any court required support payments, for any income conserved for children's education, and for expenses a recipient incurs in employment. The remainder, after these deductions from gross income, is referred to as "calculated earned income" which, together with other valuable resources a recipient may have is subtracted from the "standard of need" amount. The monetary difference between the "standard of need" and the recipient's "earned income" and resources is the amount of the recipient's monthly welfare grant.

It is apparent, however, that the Supreme Court of New Jersey failed to observe the basic distinction between the standard of need and the computation of income and resources because it found that New Jersey's use of a decreased individual standard of need corresponding with increases in the household in which a recipient lives violates the HEW regulations relating to the computation of income and resources. Furthermore, the decision of the Supreme Court of New Jersey reflects a serious misunderstanding of the holdings of this Court in *King* v. *Smith, supra* and *Lewis* v. *Martin, supra.*

In *King* the Court invalidated an Alabama welfare regulation which conclusively presumed that a whole family was ineligible for AFDC if a paramour lived with the mother of the family. The *King* case, unlike the instant case, did not involve a standard of need. This Court

carefully prefaced its holding in *King* by noting that states are free to impose eligibility requirements as to "means" and that the case did *not* involve a standard of need question. *King* v. *Smith*, 392 U. S. at 318, n. 14. Rather, *King* involved a flat denial of assistance when a paramour lived in an AFDC recipient's household. It appears that in the instant case the Supreme Court of New Jersey below misunderstood *King* to stand for the proposition that a state could not take cognizance of the presence in a recipient's household of additional persons who are ineligible for AFDC—even in the setting of a standard of need. The result of this misconstruction by the court below is that New Jersey is precluded from setting forth a standard of need in terms of average figures which recognize the general decrease in individual needs which result as household size increases.

In the *Lewis* case this Court upheld the validity of the HEW regulation (now contained in 45 C.F.R. § 233.90 (a)) providing that only income which is currently available to AFDC recipients on a regular basis could be considered *in the computation of income and resources.** Clearly, the *Lewis* holding does not apply to the instant case, because in the computation of income and resources, no income from Jo Ann Hausman's paramour was considered available to the recipients. However, it appears that the court below misunderstood *Lewis* to preclude the State from setting a standard of need figure for each AFDC recipient in a household on the supposition that each household member is paying his own *per capita* share of the expenses of maintaining the household.

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* The California statute and regulations which were invalidated in that case are set forth in *Lewis* v. *Stark*, 312 F. Supp. 197, 200-201, n. 2, 3, (N. D. Cal. 1968) and clearly pertain to the computation of income and resources.

Furthermore, the Supreme Court of New Jersey misconstrued the meaning of a standard of need as a factor in welfare administration by holding that the standard of need set by New Jersey is invalid because it establishes an "irrebutable presumption." This Court has specifically held that states have the prerogative of defining standard of need through the method they find appropriate. *Jefferson* v. *Hackney, supra; Rosado* v. *Wyman, supra.* In fact, in *Dandridge* v. *Williams, supra,* the Court sustained a Maryland regulation which placed a $250. maximum on the amount of assistance a family could receive even where a family's standard of need as defined by Maryland exceeded $250. The schedule used by Maryland took into account the number of persons who were eligible for assistance in each family and the number of persons in the entire household. This Court recognized the validity of Maryland's maximum payment schedule and held that the state could, consistently with federal statutes and regulations, recognize in its standard the greater ability of households to lessen and absorb *per capita* expenses as they increase in size. *Dandridge* v. *Williams, supra* at 479, 480.

As noted by the Director in his decision, the application of the standard of need established by the New Jersey Division of Public Welfare, depends merely upon the number of persons who are eligible for assistance under the terms of the AFDC program and the size of the household in which they live, not upon the amount of their own income. Indeed, if the additional person in this case had substantial income in his own right but made no regular contributions to the support of the ADC recipients and had no legal obligation to do so, none of his individual income would be considered available as income or resources to the ADC recipients. Further, it

should be noted that rather than attributing the income of the additional person or persons in the household to the welfare recipients in the household, the standard in § 115 at most assumes that the additional person is paying for himself as a member of the household and is not being supported by the welfare payments which are paid to those in the household who are eligible therefor *in order to meet their own needs.* In this respect, this case considers an assumption by the State which is completely different from the "attribution" of income to welfare recipients which was found to be invalid in *Lewis.*

It is significant that HEW has itself proposed the type of schedule used by New Jersey as a simplified method of determining eligibility. See, White, "Simplified Methods for Determining Needs," U. S. Dept. of Health, Education and Welfare, 1964, Method III at 6-7. Furthermore, the standard of need schedule used by New Jersey (e.g., § 115 of the Financial Assistance Manual) has been submitted to and approved by HEW. Surely if HEW considered 45 C.F.R. 233.20(a)(3)(ii)(c) or 45 C.F.R. 233.90(a) to be applicable to that standard schedule, it would have refused to approve New Jersey's state plan. This case thus presents the strange spectre of a State Supreme Court having interpreted a regulation of HEW contrary to that agency's own apparent conception of what its regulations provide.* Therefore, the Court should grant certification to determine whether the Supreme Court of New Jersey has placed limitations upon

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* The Court has on similar occasions, wherein state regulations were challenged as being out of conformity with federal regulations, sought the views of HEW with respect to the consistent interpretation which that agency has given applicable sections of the Social Security Act and its own regulations. See *Rosado* v. *Wyman,* 397 U. S. at 415 (1970); *Engelman* v. *Amos,* 404 U. S. 23, at 24 (1971).

the State of New Jersey in its administration of the federal AFDC program under a mistaken impression of what is required by the federal agency with ultimate overall responsibility for the administration of these programs.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorney General of New Jersey,
Attorney for Petitioners, New Jersey Department of Institutions and Agencies, Division of Public Welfare, Director of the Division of Public Welfare.

APPENDIX A

Opinion and Judgment of the Supreme Court of New Jersey

JO ANN HAUSMAN, RESPONDENT, v. DEPARTMENT OF INSTITUTIONS AND AGENCIES, DIVISION OF PUBLIC WELFARE, IRVING ENGELMAN, DIRECTOR, APPELLANT.

Argued December 3, 1973—Decided January 22, 1974—As Amended February 4, 1974.

The opinion of the Court was delivered by

HALL, J. This public assistance case arose as the result of a reduction in the monthly amount paid by the Mercer County Welfare Board for the subsistence of respondent and her child under the Aid to Families with Dependent Children program (ADC), a program authorized and partly financed by the federal government. 42 U. S. C. A. § 601 et seq.; N.J.S.A. 44:10-1 et seq.; see *Motyka* v. *McCorkle*, 58 N. J. 165, 168-169 (1971). The reduction came about because of the entry into the household, previously consisting only of the two recipients, of a third person not eligible for such assistance.

The reduced amount was mandated by the regulations of the state Division of Public Welfare (Division) which specify, in a tabular schedule of dollars amounts, a lower *per capita* standard of need for eligible members of a household when that household consists of both eligible and non-eligible persons, either at the time of initial eligibility or by reason of later changes in the household makeup, than when it is comprised only of eligible persons, N.J.A.C. 10:82-2.3, Schedule I; Division Financial

Appendix A

Assistance Manual § 115.[1] In New Jersey where benefits are paid to the full extent of the appropriate standard of need figure, that figure, less any income and resources actually available to the eligible recipients, determines the amount of the assistance, which is paid in the form of a flat grant.

In this case, when the household was composed only of respondent and her child, the monthly payment for each of the two eligibles according to the schedule was $107, or a total of $214; after the household was enlarged to three by the addition of the non-eligible person, the schedule called for a reduction of the *per capita* payment for the mother and child to $94, or a total of $188.[2] Respondent asserted that she had no income and received no financial contribution from the third person. This was not controverted, so we consider it established that the third person neither paid his own share of the household expenses nor contributed anything to those of respondent and her child.

On administrative review, the Director of the Division upheld the reduction of assistance on the thesis that the schedule applies without regard to the financial circumstances of the non-eligible member of the household and

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[1] The schedule applies not only to the ADC program, but as well to the similarly financed Old Age Assistance (OAA), Assistance for the Totally and Permanently Disabled (DA) and Assistance for the Blind (AB) programs, N.J.A.C. 10:82-2.2, so our conclusion has application to those programs as well.

[2] While the person joining respondent's household was her paramour, the case does not turn on that fact. The schedule calls for a lower standard of need and benefits no matter what the relationship to the recipients of the non-eligible household member.

whether or not he contributed to the support of the eligible recipients. On appeal to the Appellate Division, respondent challenged the validity of the reduced assistance called for by the schedule as applied to her as being violative of the federal enabling legislation, *i.e.*, the Social Security Act and the regulations of the Department of Health, Education and Welfare (HEW) promulgated thereunder, as well as violative of the equal protection and due process clauses of the federal constitution. That tribunal reversed the agency decision and restored the monthly assistance to the original amount, holding that the schedule, "as applied to the facts of this case," is inconsistent with the Social Security Act and the federal regulations. 124 N. J. Super. 139 (1973). We granted appellant's petition for certification. 63 N. J. 554 (1973).

While we agree with the conclusion reached by the Appellate Division, we think its holding should be clarified in view of the broad importance of the underlying issue involved.

[1] Although state participation in a federally supported categorical assistance program, such as ADC, is voluntary, a state choosing to participate must comply with the terms of the federal legislation and regulations promulgated by HEW and must secure HEW approval of its plan for implementation of the program. A state plan must "[s]pecify a statewide standard, expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment." 45 CFR 233.20(a)(2). The standard of need is a *per capita* money amount considered by the state to be sufficient to finance the purchase of those goods and services—food, clothing, shelter and the like—which are essential for minimal physical health and safety. It is

used to measure who is eligible for benefits and in New Jersey, as we have said, also represents the benefits paid. While states are free to fix their own standards of need and their own level of benefits, the federal regulations require that state plans must provide "that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis • • •" 45 CFR 233.20(a)(1). While a state shall "take into consideration any other income or resources of any child or relative claiming aid • • •," 42 U.S.C.A. § 602(a)(7), "in establishing financial eligibility and the amount of the assistance payment • • • (c) only such net income as is actually available [to the recipient] for current use on a regular basis will be considered, and only currently available resources will be considered • • •," 45 CFR 233.20(a)(3)(ii). See generally *King* v. *Smith*, 392 U. S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968); *Rosado* v. *Wyman*, 397 U. S. 397, 90 S. Ct. 1207, 25 L. Ed. 2d 442 (1970); *Dandridge* v. *Williams*, 397 U. S. 471, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970); *Lewis* v. *Martin*, 397 U. S. 552, 90 S. Ct. 1282, 25 L. Ed. 2d 561 (1970); *Jefferson* v. *Hackney*, 406 U. S. 535, 92 S. Ct. 1724, 32 L. Ed. 2d 285 (1972); *Motyka* v. *McCorkle*, *supra* (58 N. J. 165).

The state's theory to support the lower *per capita* standard of need and benefits prescribed in the schedule when the household is composed of eligible and non-eligible individuals rather than entirely of eligibles is that some so-called "economies of scale" come about merely by reason of the presence in the household of non-eligible individuals. While it is undoubtedly true, and so it can be validly assumed, that certain components of the total living costs of a household—as for example, rent, utilities and

other items going into the cost of the same shelter—remain constant even though the number of persons in the household is increased, and consequently the *per capita* cost is lower, this is not because the additional persons in the household are non-eligibles. Rather it is due simply to the presence of additional persons in the household regardless of their status or relationship. Thus the schedule provides for lower *per capita* benefits in large households composed entirely of eligibles.

[2] The real thesis behind lowered benefits when the household comprises eligibles and non-eligibles, as the Division concedes in its petition for certification, is in effect an irrebuttable presumption that the non-eligibles are paying their share of the total household expenses (as distinguished from contributing to the recipients' share) out of their income and resources from other assistance programs (see N.J.A.C. 10:82-5.4(c), employment wages or otherwise. The United States Supreme Court has long since held, in *King, supra* (392 U. S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118), and *Lewis, supra* (397 U. S. 552, 90 S. Ct. 1282, 25 L. Ed. 2d 561), that a state may not, by statute or regulation, conclusively presume that a "man in the house" or other non-eligible member of the household is bearing his share of the household expenses or contributing to the living costs of the welfare recipients so as to permit the reduction of benefits to them. To do so when that is not the fact, as in this case, means that the cost of living remains the same for the assistance recipients as when they alone comprised the household, but the benefits received are less and not enough to meet it. Consequently the dependent child—the primary object of the program—suffers. While the state has a legitimate interest in doing its utmost to see that assistance payments

are not diverted from the intended needy recipients to the support of non-eligibles and is free to determine its own standard of need—the foundation of its argument here—such cannot be accomplished by arbitrary means resulting in unjustified reduction of subsistence to the child. This would amount to a determination of need, and therefore the amount of assistance, upon an inequitable foundation contrary to the requirement of the federal regulation "that the determination of need • • • be made on an objective and equitable basis • • •." 45 CFR 233.20(a)(1).

[3, 4] This holding of the United States Supreme Court is, of course, binding on New Jersey and means that it cannot reduce welfare benefits unless the fact is established that the non-eligible member of the household is paying his share of the household expenses. As applied by the Division in this case, New Jersey's schedule of reduced payments is, therefore, as the Appellate Division held, in violation of federal regulations.

[5] But New Jersey is not entirely powerless. We think it may validly say that there is a presumption that a non-eligible member of the household is paying his share of the household expenses, thereby permitting the *per capita* reduction of need and benefits, but that the presumption is rebuttable, with the burden of coming forward and establishing that he is not so paying on the welfare recipient.

The presumption has a reasonable basis. The schedule itself is neutral and does not compel the Division's position that it is irrebuttable, but rather on its face permits an interpretation of rebuttability. Such a view merely shifts the burden of coming forward and of proof to the applicants or recipients who are in possession of the facts,

rather than placing it upon the welfare authorities who are comparative strangers to the whole household situation and would otherwise be required to make a full field investigation in every case. That such an interpretation is of great practical consequence in the efficient and proper administration of public assistance, a factor not to be overlooked, is amply demonstrated by the single fact that the Division estimates that more than 47,900 families out of 157,867 families receiving assistance in this state are composed of recipients and non-recipients (non-eligibles). The obligation of an original applicant for assistance or of a recipient when the addition of a non-eligible to the household occurs and a reduction in assistance is proposed, to come forward with the facts is not an undue one. The Division will, of course, have to provide a simple and expeditious procedure for the presentation and determination of a claim that a non-eligible member of the household is not paying his share of the expenses. When the supporting facts are presented, the welfare authorities can make such check thereof as is desired and promptly reach a decision as to whether the claim is true.

While our conclusion has not been directly passed upon by the United States Supreme Court, we believe it does not clash with the rationale of *King* v. *Smith, supra* (392 U. S. 309, 88 S. Ct. 2128, 29 L. Ed. 2d 1118) and subsequent cases in that tribunal. Judicial authority in support of it is found, however, in lower federal court cases. We refer particularly to the well-reasoned opinion in *Mothers and Childrens Rights Organization, Inc.* v. *Stanton,* —— F. Supp. —— (N. D. Ind., 1973). The case is on all fours with the one before us and the court reached the same conclusion we do. To the same effect, but dealing

with another categorical public assistance program, is *Owens* v. *Parham,* 350 F. Supp. 598 (N. D. Ga. 1972).[3] An apt summary sentence in *Mothers* may well be quoted:

> As a rebuttable presumption, the chart and regulations [akin to the New Jersey schedule involved here] reconcile the federal purposes in the AFDC [ADC] program and thus are objective and equitable: The state avoids paying funds not necessary under its definition of need; administrative efficiency is furthered; the welfare budget is protected for other needy recipients; and assistance groups living with nonrecipients not in fact sharing household expenses are protected by their right to rebut the assumed sharing of expenses. (p. —).

Since the case before us is thus disposed of on statutory grounds, we, like the Appellate Division, need not consider any constitutional contentions of appellant.

The judgment of the Appellate Division is affirmed.

For affirmance—Acting Chief Justice JACOBS, Justices HALL, SULLIVAN and PASHMAN and Judges CONFORD and COLLESTER—6.

For reversal—None.

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[3] Compare *Jenkins* v. *Georges,* 312 F. Supp. 289 (W. D. Pa. 1969), and *Hurley* v. *Van Lare,* 365 F. Supp. 186 (S. D. N. Y. 1973), in which similar state schedules and regulations were struck down as violative of the federal statute and regulations on the basis of an irrefutable presumption of a non-eligible paying his share of the household expenses. These decisions do not consider the matter of the validity of a rebuttable presumption.

APPENDIX B

Opinion and Judgment of the Superior Court of New Jersey, Appellate Division

JO ANN HAUSMAN, PLAINTIFF-APPELLANT, v. DEPARTMENT OF INSTITUTIONS AND AGENCIES, DIVISION OF PUBLIC WELFARE, IRVING ENGELMAN, DIRECTOR, DEFENTANTS-RESPONDENTS.

Superior Court of New Jersey
Appellate Division

Submitted April 30, 1973—Decided May 24, 1973.

Before Judges CARTON, MINTZ and SEIDMAN.

MINTZ, J. A. D. Plaintiff appeals from the decision of the Director, Division of Public Welfare, Department of Institutions and Agencies of the State (Division), dated August 21, 1972, which determined that her welfare grant was correctly calculated in accordance with the Division's regulations.

Appellant and her daughter receive assistance from the Mercer County Welfare Board under the "Aid to Dependent Children" program (ADC), 42 U.S.C.A. § 601 *et seq.*, and the New Jersey statutes relating to ADC, N.J.S.A. 44:10-1 *et seq.*

Appellant requested a fair hearing before the Division, but agreed to accept a written statement of the Division's position in lieu of a hearing determination. The Director of the Division in his letter statement indicated that the Manual provides public assistance for each eligible unit, and that the allowance is determined according to the size of the household and the number of persons in the eligible unit. He further stated that eligible unit refers

to the person or persons who apply and are eligible to receive public assistance. The Manual defines household as the persons living together as a family unit without regard to relationship by blood or marriage. The Director further stated:

> The foregoing provisions of official regulations apply without regard to the financial circumstances of the non-eligible person or persons who are members of the household and without regard to whether they do or do not contribute income to the support of the eligible unit.
>
> If we are correct in our understanding that there is no contention about the facts, as we have stated them above, then I advise you that a correct Decision, pursuant to any Fair Hearing proceeding before this Department, would necessarily affirm the action by the Welfare Board in determining grant entitlement in accordance with the foregoing regulations.

Prior to June 1, 1971 appellant and her daughter received a $225 monthly grant, calculated according to the Categorical Assistance Budget Manual. This grant was computed on the basis of two eligible persons living in a household consisting of two people. The monthly grant was reduced to $178, effective June 1, 1971, as a result of the fact that a second adult had moved into the premises, thereby increasing the size of the household from two to three. The State regulations provided that a household consisting of three people, two people being eligible for assistance, was only entitled to $178. The theory behind the difference is that as a household becomes larger, there are certain economies of scale that

come into play. In other words, the per capita cost of maintaining a person in a household where three people live is less than the per capita cost where two people share a household. In computing the need of two eligible people in a household consisting of three people, the Division's regulations dictate that the cost of maintaining a household of three be multiplied by two-thirds. The resulting "need" calculation is therefore a lesser amount than would result if need was computed on the basis of the two eligible people sharing the household without the presence of the third.

On July 1, 1971 the Division replaced the Categorical Assistance Budget Manual with the Financial Assistance Manual (Manual). The same principle concerning economies of scale apply in the new manual, but because need computations were figured somewhat differently appellant's monthly grant was computed as $188 instead of $178.

Appellant and her daughter have no income. She asserts that the second adult in the household, her paramour, contributes nothing to the maintenance of the household. Significantly respondent does not dispute this.

On appeal appellant challenges the validity of §115 of the Manual as it applies to her case. Her basic contention is that the reduction of her welfare grant because of a non-related person living in the household was invalid because there was admittedly no contribution by the non-related person to the maintenance of the household.

We find that §115 of the Manual as applied to the facts of this case is contrary to the Social Security Act. 42 U.S.C.A. §602(a)(7) provides:

> Except as may be otherwise provided [in § 402 (a)(8)] • • • the State agency shall, in deter-

> mining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children * * *

The Department of Health, Education and Welfare (HEW) has enacted a number of regulations implementing this statute. One such regulation is 45 CFR 233.20 (a)(3)(ii)(c) which provides in pertinent part:

> [I]n establishing financial eligibility and the amount of the assistance payment * * * (c) only such income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered.

A later regulation, 45 CFR 203.1, provides:

> [T]he presence in the home of a "substitute parent" or "man-in-the-house" * * * is not an acceptable basis * * * for assuming the availability of income by the State.
>
> [I]n the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent * * * will be considered available for children in the household in absence of proof of actual contributions.

Both of these regulations have been upheld by the United States Supreme Court. *King* v. *Smith*, 392 U. S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968). *Lewis* v. *Martin*, 397 U. S. 552, 90 S. Ct. 1282, 25 L. Ed. 2d 561 (1970). In both *King* and *Lewis* the court made it clear that only

income that is in fact available may be considered in the determination of the amount of a welfare grant.

King and *Lewis* are factually similar to the case at bar. In each instance a male moved in with the mother of an otherwise eligible unit. We can see absolutely no difference between reducing or cutting off the assistance grants on the theory that the "MARS" (male assuming the role of spouse), is providing income, as was the case in *King* and *Lewis,* and reducing the assistance grant on the theory that the *per capita* cost of three people living together is less than that of two people living together, and the mother and daughter now only pay two-thirds of the total cost. The latter is clearly based on the assumption that the new member of the household, the MARS, is contributing income equal to one-third the cost of the maintenance of the household. *King* and *Lewis* made it clear that it cannot be assumed that a MARS is contributing to the income of the household. As already noted, in the case at bar it was conceded by respondent that the MARS did not in fact contribute. For this reason §115 of the Financial Assistance Manual as applied to the facts of this case is inconsistent with the Social Security Act and the regulations enacted pursuant thereto.

The decision of the Division is reversed. Appellant's welfare grant is adjusted to $214 monthly retroactive to the date of reduction.

APPENDIX C

Determination of the Director of the New Jersey Division of Public Welfare

August 21, 197

Michael J. Weintraub, Esq.
Legal Aid Society of Mercer County
125 South Warren Street
Trenton, New Jersey

Re: Mrs. Jo Ann Hausman—LC-5810
805 South Clinton Avenue
Trenton, New Jersey

Dear Mr. Weintraub:

I have been informed by Mr. Lewis W. Fuller, Chi Hearing Officer for this Division, that you have agreed t accept a written statement of this Division's interpret tion and position with respect to the relevant law an facts in the Hausman case, in lieu of conducting an i personam proceeding and processing a formal Hearin Decision on the appeal you had presented on behalf Mrs. Jo Ann Hausman.

The issue at appeal is understood to pertain to the co rectness of the determination by the Mercer County We fare Board last December with respect to the amount assistance to which Mrs. Hausman has been entitle There appears to be no dispute of the following fact that the household, at the time of the determination question, consisted of Mrs. Hausman, her child and a thi non-related person. The records submitted to this Di sion show that the calculation of the amount of entit ment was based on recognition of an eligible unit of t persons within a household consisting of three persons.

Such determination was correctly based on regulations duly promulgated by this Division, Financial Assistance Manual, Section 111, as follows:

> "The public assistance allowance is an inclusive amount established for each *eligible unit.* The allowance is determined according to size of the household and the number of persons in the eligible unit.
>
> a. *Eligible Unit*—The person or persons in the household who apply for and are eligible to receive public assistance. (See Section 120)
>
> b. *Household*—The persons living together as a family unit, without regard to relationship by by blood or marriage."

The foregoing provisions of official regulations apply without regard to the financial circumstances of the non-eligible person or persons who are members of the household and without regard to whether they do or do not contribute income to the support of the eligibile unit. If we are correct in our understanding that there is no contention about the facts, as we have stated them above, then I advise you that a correct Decision, pursuant to any Fair Hearing proceeding before this Department, would necessarily affirm the action by the Welfare Board in determining grant entitlement in accordance with the foregoing regulations.

Sincerely yours,

/s/ Irving Engelman
Irving J. Engelman, Director
Division of Public Welfare

APPENDIX D

Statutory and Administrative Provisions Involved

FEDERAL SOCIAL SECURITY ACT

Section 402(a)(7), 42 U.S.C. § 602(a)(7)

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary.

(a) A State plan for aid and services to needy families with children must . . .

(7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income.

REGULATIONS OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

45 C.F.R. § 233.20(a)(1),(2) and (3)

§ 233.20 Need and amount of assistance.

(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

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(1) *General.* Provide that the determination of need and amount of assistance for all applicants and recipients will be made on an objective and equitable basis and all types of income will be taken into consideration in the same way, except where otherwise specifically authorized by Federal statute.

(2) *Standards of assistance.* (i) Specify a statewide standard, expressed in money amounts, to be used in determining (*a*) the need of applicants and recipients and (*b*) the amount of the assistance payment.

(ii) In the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with subparagraph (3)(viii) of this paragraph. Nevertheless, if a State maintains a system of dollar maximums, these maximums must be proportionately adjusted in relation to the updated standards.

(iii) Provide that the standard will be uniformly applied throughout the State.

(iv) Include the method used in determining needs, which must be one of the three methods described in "Guides and Recommendations" or a comparable method which meets the conditions specified in such guides and is approved by the Assistance Payments Administration.

(v) If the State agency includes special need items in its standard, (*a*) describe those that will be recognized, and the circumstances under which they will be included, and (*b*) provide that they will be considered in the need determination for all applicants and recipients requiring them.

(vi) If the State chooses to establish the need of the individual on a basis that recognizes, as essential to his well-being, the presence in the home of other needy individuals, (*a*) specify the persons whose needs will be included in the individual's need, and (*b*) provide that the decision as to whether any individual will be recognized as essential to the recipient's well-being shall rest with the recipient.

(vii) Provide that assistance payments to any tenant or group of tenants in low-rent housing will not be reduced because of the rent reduction resulting from the application of the not more than 25 percent of income rent limitation in section 2(1) of the U. S. Housing Act of 1937 as amended, 42 U.S.C. 1402(1). Under this requirement, if a State provides for shelter on an "as paid" basis, the amount recognized for shelter for a public housing tenant is the amount that would have been recog-

nized on December 22, 1971, for a tenant in the same assistance program with like family composition living in the public housing unit.

(3) *Income and resources; OAA, AFDC, AB, APTD, AABD.* (i) Specify the amount and types of real and personal property, including liquid assets, that may be reserved, i.e., retained to meet the current and future needs while assistance is received on a continuing basis. In addition to the home, personal effects, automobile and income producing property allowed by the agency, the amount of real and personal property, including liquid assets, that can be reserved for each individual recipient shall not be in excess of two thousand dollars. Policies may allow reasonable proportions of income from businesses or farms to be used to increase capital assets, so that income may be increased.

(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment: (*a*) All income and resources, after policies governing the allowable reserve, disregard or setting aside of income and resources have been applied, will be considered in relation to the State's standard of assistance, and will first be applied to maintenance cost; (*b*) if agency policies provide for allocation of the individual's income as necessary for the support of his dependents, such allocation shall not exceed the total amount of their needs as determined by the statewide standard; (*c*) only such net income as is actually available for current use on a regular basis will be considered, and only

currently available resources will be considered; and (*d*) income and resources will be reasonably evaluated.

(iii) Provide that no inquiry will be made of the amount of earnings of a child under 14 years of age.

(iv) Provide that, in determining the availability of income and resources, the following will not be included as income: (*a*) Income equal to expenses reasonably attributable to the earning of income (including earnings from public service employment); (*b*) loans and grants, such as scholarships, obtained and used under conditions that preclude their use for current living costs; and (*c*) home produce of an applicant or recipient, utilized by him and his household for their own consumption.

(v) Provide that agency policies assure that when support payments by absent parents have been ordered by a court, a regular amount of income is available monthly to meet the determined needs of the mother and children, whether or not the support payments are received regularly, and the agency does not delay or reduce public assistance payments on the basis of assumed support which is not actually available.

(vi) If the State agency holds relatives responsible for the support of applicants and recipients, (*a*) include an income scale for use in determining whether responsible relatives have sufficient income to warrant expectation that they can contribute to the support of applicants or recipients, which in-

come scale exceeds a minimum level of living and at least represents a minimum level of adequacy that takes account of the needs and other obligations of the relatives; and (*b*) provide that no request will be made for contributions from relatives whose net cash income is below the income scale. In family groups living together, income of the spouse is considered available for his spouse and income of a parent is considered available for children under 21.

(vii) If the State agency establishes policy under which assistance from other agencies and organizations will not be deducted in determining the amount of assistance to be paid, provide that no duplication shall exist between such other assistance and that provided by the public assistance agency. In such complementary program relationships, nonduplication shall be assured by provision that such aid will be considered in relation to: (*a*) The different purpose for which the other agency grants aid, such as vocational rehabilitation; (*b*) the provision of goods and services that are not included in the statewide standard of the public assistance agency, e.g., a private agency might provide money for special training for a child or for medical care when the public assistance agency does not carry this responsibility; or housing and urban development payments might be provided to cover moving expenses that are not included in the assistance standard; or (*c*) the fact that public assistance funds are insufficient to meet the total amount of money determined to be needed in accordance with the statewide stand-

ard. In such instances, grants by other agencies in an amount sufficient to make it possible for the individual to have the amount of money determined to be needed, in accordance with the public assistance agency standard, will not constitute duplication.

(viii) Provide that payment will be based on the determination of the amount of assistance needed and that, if full individual payments are precluded by maximums or insufficient funds, adjustments will be made by methods applied uniformly statewide.

(ix) Provide that the agency will establish and carry out policies with reference to applicants' and recipients' potential sources of income that can be developed to a state of availability. * * *"

45 C.F.R. 233.90(a)

§ 233.90 Factors specific to AFDC.

(a) *State plan requirement.* A State plan under Title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural or adoptive parent

and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the houshold in the absence of proof of actual contributions.

• • •

NEW JERSEY FINANCIAL ASSISTANCE MANUAL

Section 111.

The public assistance allowance is an inclusive amount established for each eligible unit. The allowance is determined according to size of the household and the number of persons in the eligible unit:

1. Eligible unit is the person or persons in the household who apply for and are eligible to receive public assistance.

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2. Household is the persons living together as a family unit, without regard to relationship by blood or marriage.

• • •

Section 115

[PHOTOSTAT]

(Opposite) ☛

Section 115

Number in Household	ADULTS ONLY		Income in Eligible Unit: ADULTS AND CHILDREN														
	1	2	1*	2	3	4	5	6	7	8	9	10	11	12	13	14	15
1	142.																
2	111.	222.	107.	216.													
3	103.	200.	94.	188.	282.												
4	89.	178.	81.	162.	243.	325.											
5	82.	164.	72.	144.	216.	288.	360.										
6	77.	154.	70.	140.	210.	280.	350.	420.									
7			66.	132.	198.	264.	330.	396.	462.								
8.			63.	126.	189.	252.	315.	378.	441.	504.							
9			61.	122.	183.	244.	305.	366.	427.	488.	549.						
10			58.	116.	174.	232.	290.	348.	406.	464.	522.	580.					
11			57.	114.	171.	228.	285.	342.	399.	456.	513.	570.	627.				
12			56.	112.	168.	224.	280.	336.	392.	448.	504.	560.	616.	672.			
13			55.	110.	165.	220.	275.	330.	385.	440.	495.	550.	605.	660.	715.		
14			54.	108.	162.	216.	270.	324.	378.	432.	486.	540.	594.	648.	702.	756.	
15			53.	106.	159.	212.	265.	319.	371.	424.	477.	530.	583.	636.	689.	742.	795.

*Applies to one child only or adult living in a household of 7 or more.
In eligible units of more than 15, add $35.for each additional member